THE

RIGHT

OF THE

ELDEST SONS

OF THE

PEERS OF SCOTLAND

TO REPRESENT THE

COMMONS of that Part of GREAT BRITAIN
in PARLIAMENT,

CONSIDERED.

PRINTED IN THE YEAR MDCCXC.

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CONSIDERED.

THE Houſe of Commons having lately declared a ſeat vacant, in conſequence of a rule, ſuppoſed to have obtained in Scotland before the Union, that the eldeſt Son of a Peer is incapable of repreſenting the Commons in Parliament, thoſe immediately intereſted were led to conſider, Whether there really was ſuch a rule of law, and upon what foundation a notion ſo ſingular could reſt? A noble Lord * favoured the Public with his thoughts on the ſubject, dictated by a regard to his order, and a ſpirit of free inquiry, which does him honour. Since that publication, much light has been afforded by the reſearches and obſervations of another noble Lord †; and their labours make it an eaſy taſk to ſtate the merits of the queſtion clearly and conciſely, for the information of thoſe who have not leiſure or inclination to peruſe the argument and authorities at large.

* Lord Saltoun. † Lord Daer.

It may be remarked in the outſet, that thoſe who are moſt concerned in the queſtion profeſs to aim, not at the *acquiſition*, but at the *recovery* of a privilege: Not to *alter* a part of the conſtitution, but to *reſtore* it. There is a wide difference between recurring to theoretical principles, and aſſerting a conſtitutional right once acknowledged, and aboliſhed by no law, the exerciſe of which is alledged to be ſuſpended only, either from thoſe entitled not claiming it, or from the erroneous deciſions of Judges. The right of electing to Parliament cannot be loſt by diſuſe. There are many inſtances in England of places, which had neglected to ſend repreſentatives for centuries, being reſtored to the franchiſe whenever it was claimed. Much leſs can the capability of being elected be loſt, for that is the
1560. birth-right of every ſubject not excluded by poſitive law. The hiſtory of Scotland ſhows that the whole body of landholders, other than the nobility, had neglected to attend Parliament for ſo long a time that their right came to be doubted; but it was recognized as ſoon as the ancient practice was aſcertained. In later times, there is an inſtance of a county in that kingdom being reſtored to the right of ſending repreſentatives after long diſuſe.

A deciſion of the proper judicature, that a perſon is incapable of being elected, though it binds the particular caſe and the parties irrevocably, cannot alter the law, even when it profeſſes to lay down a general rule. If the exiſtence of the right is proved in a ſubſequent caſe, no liberal man will oppoſe the reſumption of it; and, if the error of former determinations is demonſtrated, Judges are bound to reverſe the principle.

Upon theſe grounds, the claim of the eldeſt ſons of the Peers of Scotland ſhall be here conſidered. It is not meant to introduce arguments from expediency; to aſk, Whether it is reaſonable to exclude, for a time, from the legiſlative body, men, who, by their birth, muſt one day make a part of it? to exclude them at a time of life when they can be moſt uſeful, becauſe they *may be* included at

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an after uncertain period? or, Whether a diſtinction ought to be made between the ſons of Engliſh and of Scots Peers, whilſt Mr Hatſell's poſition is indiſputable, that 'It is of great importance that 'young noblemen ſhould paſs through the Houſe of Commons to 'the Houſe of Lords, as a ſchool in which they hear the firſt prin- 'ciples of the conſtitution ably and freely debated, and where they 'acquire ideas of freedom and independence, and contract habits of 'buſineſs?'

Precedents, Vol. ii. p. 13.

That the eldeſt ſon of a Peer of Scotland is incapable of being elected to repreſent a county or a borough in that part of Great Britain, is a propoſition for which no *written* authority can be produced, except two reſolutions of the Parliament of Scotland; one in 1685, and another in 1689; and a reſolution of the Britiſh Houſe of Commons in 1708. There is not a word in the Statute Book to give countenance to it. There is not a ſyllable to that purpoſe in any writer upon the law of Scotland before the Union.

Though there is reaſon to think, the firſt of thoſe reſolutions in the Scots parliament paſſed without obſervation or conſideration, and the ſecond with very little; though both appear to have originated in party; and though the reſolution of the Britiſh Houſe of Commons ſeems to have had no foundation but the Scots ones; it may readily be admitted, that the reſolutions are entitled to reſpect, eſpecially after the laſt has been ſo long ſeemingly acquieſced in; that they are *prima faciae* evidence of the law; and that it lies upon thoſe who impugn them, and the evidence they afford, to ſhow in the moſt ſatisfactory manner that they were erroneous. If that can be done, it will not be ſaid that error ſhould be perſiſted in. It will not be contended by any perſon acquainted with legal principles, that thoſe reſolutions have the force of general laws, and much leſs that general law could in that ſhape be abrogated.

This is what the eldeſt ſons of the Peers of Scotland muſt undertake to do. And, as the Reſolutions, though not ſupported by written

ten law, may be ſuppoſed to have been founded in unwritten law or cuſtom, unleſs the contrary is proved, it is neceſſary to ſhow what the law and cuſtom of Scotland, in ancient times, was in this reſpect.

It is therefore propoſed here, 1ſt, To ſhew, that, by the Conſtitution of the Parliament of Scotland, prior to the year 1587, when the repreſentation of the counties was eſtabliſhed, the eldeſt ſons of peers, when poſſeſſed of qualifications, muſt *of neceſſity* have been, and in fact were, conſtituent members. 2dly, To conſider whether the act paſſed in 1587, which diſpenſed with the attendance of the landholders under the degree of peers, and required that they ſhould appear thereafter, by their repreſentatives, or any ſubſequent ſtatute, excluded the eldeſt ſons of peers from chooſing, or being themſelves choſen, parliamentary repreſentatives of the landholders. 3dly, To give an account of the reſolutions and other tranſactions in parliament ſince the year 1587, which are ſuppoſed to affect the right of the peers eldeſt ſons, and make ſome obſervations upon them. And, laſtly, To conſider the arguments uſed by writers and others, who contend for the excluſion, or ſuppoſe it a point ſettled.

Conſtitution of the Scots Parliament prior to 1587.

I. The Parliament of Scotland differed in its conſtitution and form of proceedings from the parliament of England in ſeveral particulars. From the earlieſt period, down to the time of the Union, the Lords and Commons formed but one houſe, and voted promiſcuouſly. The Parliament conſiſted, however, of three diſtinct bodies or *eſtates*, which were a check on one another, in ſome points, unneceſſary to be here mentioned. The firſt *eſtate* was that of the clergy, compoſed of the prelates and other dignitaries. The ſecond was compoſed of all the landholders, tenants of the King *in capite*, whether lords or commons, and whether their eſtates were great or ſmall, under the denomination of barons or freeholders; for the term *freeholder* is in Scotland applied only to thoſe who hold lands of the crown. The repreſentatives of the royal boroughs made the third eſtate. At what

period

period they were introduced into parliament is not known; but, comparatively with the barons, it was at a late one.

Lord Kaims's Eſſays on Britiſh Antiquities, and other authorities.

Parliament was originally no other than an aſſembly of the King's vaſſals in his court, or as paramount lord or ſuperior of all the lands in the country. The attendance was an obligation neceſſarily ariſing from their tenure, in the ſame way as the vaſſals of meſne lords, or ſubject ſuperiors, were bound to give ſuit and preſence in their courts. Hence, none but the *immediate* vaſſals of the crown were admitted, or, more properly ſpeaking, were *compellable to attend* parliament; and all who held immediately of the crown were conſtituent members. Hence, likewiſe, the introduction of the repreſentatives of royal burghs. The burgeſſes held their lands and tenements ſeverally of the King; and every one of them was entitled, as his tenant, to a ſeat in parliament; but, that being inconvenient, they were allowed to attend by their repreſentatives. Lord Stair, treating of the Feudal Syſtem, writes thus: 'In Scotland, the King, 'as ſupreme ſuperior, ruleth *by his vaſſals aſſembled in Parliament*, in 'which, at firſt, all were perſonally preſent, who held lands im- 'mediately of him; as barons, great and ſmall freeholders of any 'moment, holding a forty ſhilling land, of old extent, of the King, 'and prelates for church lands. The free burghs were alſo repre- 'ſented in parliament by their commiſſioners, as holding the bur- 'gage lands, and their freedoms and privileges, as feudatories of 'the King: So that there was not one foot of ground in Scotland 'whoſe lord was not preſent in parliament, by himſelf or his dele- 'gate. But, when feus holden of the King came to be ſubdivided 'and multiplied, two or more commiſſioners were admitted in parlia- 'ment, in name of the meaner barons or freeholders.' To the ſame purpoſe, Lord Bankton: 'Originally with us, *none had a ſeat in par- 'liament but thoſe poſſeſſed of a freehold of the King*. Thus, the biſh- 'ops, and likewiſe the peers, ſat in reſpect of their baronies, all no- 'bility and peerage being of old territorial; and the other freehold-

Lord Stair's Inſtitutions, B. 2. Tit. 3.

Lord Bankton's Inſtitute, B. 4. tit. 1. § 8.

'ers,

'ers were all entitled to ſit in parliament, *and bound to attend*, till 'the ſmall barons, *as a privilege*, were exempted, and allowed to 'chooſe commiſſioners to repreſent them.'

The three *eſtates* of parliament continued, as above mentioned, till the Revolution, when the eſtate of the clergy being annihilated, and it being reckoned neceſſary, as it would ſeem, ſtill to have the name of *three* eſtates, the nobility were ſeparated from the other landholders, and made the firſt eſtate. The repreſentatives of thoſe other landholders, or leſſer barons, as they were called, (for repreſentation in counties had ſome time before taken place, as ſhall be afterwards mentioned), made the ſecond eſtate. And the borough repreſentatives continued to be the third.

Caſe of Lady Sutherland by Lord Hailes, chap.

Hereditary titles of nobility were conferred by the King, in Scotland, from the moſt ancient times of which any record remains. It is certain that theſe peerages were anciently territorial, and paſſed with the land; as the authorities quoted above, and many others which might be referred to, ſhew. They were afterwards perſonal, conferred by patent, or by inveſtiture in parliament. Thoſe who held ſuch honours came to be called *noblemen*, *lords of parliament*, and *greater barons*, to diſtinguiſh them from the freeholders or *leſſer barons*, but ſtill they continued of the ſame *eſtate* with the general body of the freeholders or barons; nor is there any reaſon or authority for thinking, that, *in parliament*, they enjoined any privilege beyond the leſſer barons, except that of rank and precedency. It may be ſuppoſed, that, after peerages came to be conferred without regard to any particular territory, the holders were conſidered as conſtituent members of Parliament, and that they ſat *as peers*, rather than *as the King's vaſſals*; though it is ſcarcely to be imagined that there ever was one of them without lands held of the King, and conſequently not entitled to attend parliament, and to be of the ſame *eſtate* as a freeholder, independent of his peerage. The *obligation* might thus, in idea, be changed into a *privilege*, analogous

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to the hereditary counſellorſhip annexed to the peerage in England. But, however that may be, the eſtate of the barons, including both the greater and ſmaller, was ſtill conſidered as *repreſenting the land of the kingdom;* and they were all, ſo far as is known, upon the ſame footing, when met.

It is proved indiſputably by the records, that, before the introduction of repreſentatives for the counties, eldeſt ſons of the peers or nobles attended parliament, and were accounted as belonging to the eſtate of barons or landholders, tenants of the King *in capite.* Upon this the preſent queſtion mainly hinges; and it is therefore hoped that thoſe who wiſh to form a fair judgment upon it will attend to the fact, and the neceſſary inferences from it.

That there ſhould not be many inſtances of the eldeſt ſons of peers attending as conſtituent members is not wonderful, becauſe none but thoſe who held *freehold* lands in their own right could attend, or were admiſſible. One inſtance, well authenticated, would afford evidence of what is meant to be eſtabliſhed as good as a thouſand. But there are many, and in ſuch various ſituations, as ſerve to refute all the ſuppoſitions of thoſe who, forced to admit the fact, endeavour to explain it in conſiſtency with the hypotheſis of the peers ſons not being *efficient* members.

There are no authentic rolls of the members who attended Parliament till the year 1466, in the reign of James III.; but, from that time, the records are exiſting, in tolerable preſervation, down to the Union in 1707. At the opening of each Parliament or Seſſion, there is generally a roll containing the names of the members then preſent, or, in the later times, containing the names alſo of all who appear to have attended on future days during the Seſſion.

See copies of the rolls in the Appendix.

A ſearch of the records has afforded the names of above thirty eldeſt ſons of peers in Parliament, moſt of them ſitting in two or three different Parliaments; ſo that, on the whole, there are inſtances, to the number of fifty-ſeven or thereby, of their being preſent.

The firſt is on the 1ſt of March 1478-9, and the laſt on the 29th of November 1558; after which, none are mentioned in the rolls preſerved in the public Regiſter: But, beſides theſe, there is a liſt of the members of the Parliament or Convention in 1560, well authenticated, by which it appears that ſeveral of the eldeſt ſons of Peers then attended. That the eldeſt ſons did not attend as proxies for their fathers, as has been ignorantly alledged, is proved by the fathers ſitting at the ſame time in twenty-four inſtances; and that they ſat and acted as conſtituent or efficient members, is demonſtrated by the circumſtance of their being appointed on committees. There is an inſtance particularly of the Earl of Huntley's eldeſt ſon being of the Committee of Articles, the importance of which, every one who is the leaſt converſant in Scots hiſtory knows, and that while his father was alſo attending Parliament.

In the Cottonian Library.

There is no reaſon for ſuppoſing that the peers ſons, who are thus proved to have attended, ſat in any other character than that of leſſer barons, or freeholders, entitled by their private properties. Lord Kaims, in his Eſſay on the Conſtitution of Parliament, ſays, 'In later times, (meaning not long before 1587), the barons by tenure, who attended Parliament, were moſtly the eldeſt ſons of the nobility *infeft in* (i. e. ſeiſed of) *lands, to entitle them to a ſeat there.*' It is not eaſy, at this diſtance of time, conſidering the change of property, and the imperfection of the Regiſter of Charters and *Seiſins*, to aſcertain what preciſe lands were enjoyed by the peers eldeſt ſons who are marked as ſitting in Parliament; but, in ſundry inſtances, it can be proved by the records that they actually had, in their own right, eſtates entitling them to ſit as leſſer barons. According to feudal principles, if the eldeſt ſon of a peer, poſſeſſed lands held of the King, he muſt of *neceſſity* have attended Parliament, or forfeited his eſtate; unleſs recourſe is had to ſo wild a ſuppoſition, as that the King, in every ſuch caſe, diſpenſed with the attendance; and therefore, though the records had not afforded a

Kaims's Eſſays, p. 99.

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ſingle inſtance of a perſon, in that ſituation, attending, the only inference would have been, that no eldeſt ſon of a peer had happened to be poſſeſſed of freehold lands; but the right in law would have been the ſame. If the eldeſt ſon of a peer ſucceeded to a dignity, or greater barony, by the maternal line, or by collateral ſucceſſion, it will not be contended, ſurely, that he was incapable of ſitting in parliament by virtue of that title, though, at the ſame time, apparent heir of his father's dignity; and, by parity of reaſon, and in preciſe conformity with the conſtitution, if he ſucceeded to a *leſſer* barony, or acquired one during his father's life, he muſt have been inſtantly entitled to a ſeat as a leſſer baron.

The concluſion from all this may be laid down with perfect confidence, *That, prior to the year* 1587, *the eldeſt ſons of peers were admiſſible to Parliament, like other landholders, and when there were of that eſtate or claſs which correſponds to the repreſentatives of the commons in modern times.*

Alteration in the Conſtitution of the Scots Parliament.

II. The next thing to be conſidered, is the alteration made in the Conſtitution of Parliament, by allowing repreſentatives for the *leſſer barons*, inſtead of compelling their perſonal attendance; and whether the eldeſt ſons of peers, who happened to be leſſer barons, poſſeſſed of freeholds in their own right, and who had previouſly been entitled to ſit in parliament, were excluded from having a voice in the election of thoſe repreſentatives, or from being themſelves choſen.

It has been mentioned, that attending Parliament was a feudal obligation or burden acceſſary to the tenure. The burden was, of courſe, moſt felt by thoſe who had ſmall poſſeſſions; and their number, by the ſplitting of property, was continually increaſing. By an act of James I. in 1425, the perſonal attendance of all freeholders, without diſtinction, was ſtrictly required. It is probable that this was complained of as a grievance, becauſe, within two years after (1427), another act was paſſed, diſpenſing with the at-

tendance of the *ſmall barons and free tenants*, provided they ſent two repreſentatives or commiſſioners from each ſheriffdom. It was thus left optional to attend in perſon, or by repreſentation. The term *ſmall barons*, in this act, is uſed in the literal ſenſe, ſignifying thoſe who had ſmall properties, and not, as it came afterwards to be uſed, in contradiſtinction to the greater barons or peers. Accordingly, by ſubſequent ſtatutes, in the reigns of James II. and IV. the extent of the property which entitled the holder to diſpenſation from perſonal attendance, and to chooſe repreſentatives, is preciſely aſcertained. During the period from 1427 to 1587, the *eſtate* of the barons in parliament might have been diſtinguiſhed into three claſſes, 1ſt, The greater, or nobility; 2d, The barons or freeholders, under the degree of nobility, but poſſeſſed of eſtates of too high a value to be permitted to ſit by repreſentatives. And, 3d, The repreſentatives of the ſmall barons. But, in fact, the privilege given by the acts prior to 1587 was never exerciſed. The barons eſtate in parliament was compoſed, as formerly, of the peers and barons under the degree of peers, who choſe to attend, including the eldeſt ſons of peers who happened to be poſſeſſed of freehold lands in their own right. By the roll of the Convention Parliament held in 1560, there appear to have attended, 28 of the clergy; 33 of the nobility; amongſt whom are particularly to be remarked the Earls of Mariſhall and Glencairn, and the Lords Sommerville and Lindeſay; 101 leſſer barons, amongſt whom are five eldeſt ſons of peers, the *maſters* of Mariſhall, Glencairn, Sommerville, Lindeſay, and Sinclair; and 22 commiſſioners or repreſentatives of boroughs. The eldeſt ſons of peers, at that period, were diſtinguiſhed by their father's title, with the addition of *maſter*. Thus, Lord Mariſhall's eldeſt ſon was ſtyled, *The Maſter of Mariſhall*. His ſecond ſon would have been called Mr Keith.

James VI. Parliament II. C. 114. In the year 1587, an act was paſſed which deſerves particular attention. It recites the act of James I. 1427, ratifies it, and directs that it

it ſhould be carried into execution in time coming. And it enacts, That *commiſſioners to parliament* ſhould thereafter be elected for each county, and that *all freeholders of the King, under the degree of prelates and lords of parliament*, ſhould be warned by proclamation to be preſent at the chooſing of the commiſſioners, and thoſe who had a forty ſhilling land in free tenantry, holden of the King, ſhould have voices in the election. The act concludes with a declaration, 'That the appearance of the ſaid commiſſioners of the ſhires in Par-'liaments and general Councils ſhould *relieve* the whole other ſmall 'barons and freeholders of the ſhire of their ſuits and preſence in 'Parliament.'

Though this act does not expreſsly diſcharge the barons and freeholders, under the degree of Prelates and Lords of Parliament, from perſonal attendance, yet it was ſo underſtood. What has been repeatedly mentioned, that the attendance was conſidered as a burden, not as a privilege, is a key to this, as well as other things. They were to be *relieved* from ſuit and preſence if they ſent commiſſioners; and, as it was not to be ſuppoſed that any would reject that proffered relief, the clauſe was tantamount to expreſsly debarring perſonal attendance.

Accordingly, from the time of paſſing this act, none of the leſſer barons appear to have ſat in Parliament but as repreſentatives by election, and repreſentatives were regularly choſen for the counties.

From this period, the term Smaller or *Leſſer Barons* was applied ſtrictly to all freeholders under the degree of Lords of Parliament, holding lands of the extent mentioned in the act, and the term *Greater Barons* diſtinguiſhed the Peers. But ſtill the greater barons, and the repreſentatives of the leſſer, made only *one eſtate* in Parliament.

From this period too, it is admitted, that the name of no eldeſt ſon of a Peer is to be found in the rolls of Parliament that are extant; nor is there any other evidence that they ſat, or attempted to

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ſit, till the end of the following century. From hence it has been argued, that this act of 1587 *muſt have been underſtood* to exclude them from a voice in the election of the repreſentatives of the leſſer barons, and from being themſelves elected. So the argument, if it deſerves the name, muſt be ſtated; for it cannot be pretended, that the act contains one word which can be wreſted into any thing like a direct excluſion, or one expreſſion which can with any propriety be ſaid to be aimed at the Peers ſons in particular. The only colour which the argument derives from the act, is the coincidence of its date, and of the eldeſt ſons of Peers ceaſing to appear in Parliament. Even this might be diſputed; for, in fact, they had ceaſed attending, if their non-appearance in the rolls can be called ſo, thirty years before; and there are no rolls extant for twenty-ſeven years after, in which period there were frequent Parliaments: So that, for ought that is known, the eldeſt ſons of Peers may have been elected, and have ſat as entitled by the terms of the act 1587.

The eldeſt ſons of the Peers have no occaſion to prevent their opponents from making any uſe they pleaſe of this act, and of every other in the Statute Book. In return, they may found upon it, as deciſive of the queſtion in their favour.

It ſeems a fair argument, That, whether the eldeſt ſons of Peers ſat in Parliament before this time or not, yet, under the general comprehenſive words of the act 1587, which grants the privilege of electing, and conſequently of being elected commiſſioners, *to all freeholders of the King under the degree of Prelates and Lords of Parliament*, the eldeſt ſons of Peers, having freeholds, are included, becauſe it is impoſſible to maintain that they were, at the paſſing of this act, called or underſtood to be *Lords of Parliament*. It might as well be ſaid that they were *Prelates*. *Lords of Parliament* is a term of deſcription ſynonimous with greater baron, in contradiſtinction to leſſer baron, or a perſon of inferior order, and correſponds almoſt exactly to the Engliſh term *Peer of Parliament*. In Scotland, when

when a perſon of an inferior order was to be made a noble of the loweſt claſs, it was not done by creating him a baron, or granting him a barony, as in England; but it was by creating him *a Lord of Parliament*, either by patent or by inveſtiture. *Baron*, in the legal ſenſe of the term, in Scotland, is a perſon, whether noble or commoner, who holds lands with certain privileges; as the territory, to the holding of which theſe privileges are annexed, is called *the barony*. In parliamentary language, *baron* is a perſon who holds lands in any way of the King, and the ſame as *freeholder*.

By the words, *Under the degree of Lords of Parliament*, in the act 1587, is meant under *the rank of nobility*; and therefore, even ſuppoſing it had not been ſhewn that the eldeſt ſons of Peers ſat in Parliament prior to the act 1587, as leſſer barons, by virtue of their freeholds; or that it could be ſhewn that they never did; ſtill the fair and legal concluſion, from the terms of the act, would be, that the privilege of electing, and being elected, repreſentatives of the leſſer barons, was meant *to be conferred* on them when poſſeſſed of freeholds, there not being a ſyllable in the act to exclude them.

But, without carrying the argument that length, and taking the act in the ſenſe in which it has been generally underſtood, namely, as intended to draw a line of diſtinction between the Peers, or greater barons, and the commoners, or leſſer barons, leaving the *former* preciſely in the ſame ſituation they were, that is, conſtituent members of Parliament, whoſe perſonal attendance was required; and excluding the great body of the *latter*, ſo that, from that time forward, they ſhould have a right to ſit only by their repreſentatives; the act, when coupled with the indiſputable fact of the Peers eldeſt ſons having been previouſly admitted, and conſtantly in uſe, to ſit as leſſer barons, when they had that character in them, is deciſive; and what they found upon it may be ſtated in the ſhape of a ſyllogiſm.

By the act of 1587, all perſons then belonging to the *eſtate* of barons, under the degree of Prelates and Lords of Parliament, were

excluded

excluded from perſonal attendance; and, in lieu of it, a privilege was conferred upon them of electing, and of being elected, repreſentatives of the leſſer barons.

The eldeſt ſons of Peers, being under the degree of Prelates and Lords of Parliament, were of the eſtate of barons, and ſat in Parliament when poſſeſſed of freeholds, and conſequently were of the number excluded by the act from attending perſonally.

Therefore by the act they became, and are entitled to elect, or to be elected repreſentatives.

This act of 1587 is ſtill in force, and is the baſis of all the election laws for Scotland.

The only other ſtatutes reſpecting elections, before the Union, are thoſe of Charles II. Parliament I. 1661, c. 35. and Parliament III. 1681, c. 21. By theſe, the eſtates and qualifications of the electors are defined more preciſely than they were by the act of 1587; and reſidence in the county, which that act required in the elected, is diſpenſed with; but the right of electing, and to be elected, is left, as before, open to all men poſſeſſed of the qualification in freehold land, *excepting noblemen and their vaſſals*. As a particular exception ſerves to ſtrengthen a general rule, it ſeems impoſſible to diſpute, that the right of electing, and being elected, was given to the eldeſt ſons of Peers, being freeholders; or, at leaſt, impoſſible to contend, that, if they had the right formerly, it was now taken away, unleſs it can be maintained that they were meant to be deſcribed by the term *noblemen*, a term which, in common language, is ſcarcely ever, and never with propriety, applied to them, and which certainly was not, nor could be meant as a legal deſcription of them. It was introduced into the act with propriety, and ſtands there as deſcriptive of the Peers, or greater barons, to controul the broad words *all heritors*, (that is, landholders), which otherwiſe would have conferred on the Peers a right to interfere in the election of the commons. It is farther to be obſerved, that the preamble of the act 1661 bears,

that

that it was made *to remove all doubts as to who were capable of electing or being elected repreſentatives.* It then declares the right to be veſted in *all heritors* poſſeſſed of eſtates to the extent therein mentioned, excepting noblemen and their vaſſals. A more expreſs and unequivocal authority upon the point now under conſideration cannot be figured.

Reſolutions and Entries in the Journals of Parliament, relative to the right of Peers eldeſt ſons, with Obſervations.

III. So ſtood the law and the practice, with reſpect to the eldeſt ſons of Peers, when the following entry was made in the minutes or journals of the Scots Parliament: 'Edinburgh, the 23d of April '1685. In reſpect the Viſcount of Tarbat's eldeſt ſon, elected one 'of the commiſſioners for the ſhire of Roſs, *by reaſon that his fa-* '*ther is nobilitated*, cannot now repreſent that ſhire, warrant was 'given to the freeholders of that ſhire to meet and elect another 'perſon in his place.'

Upon this reſolution or memorandum it ſhall only be obſerved here, that the Viſcount of Tarbat was Sir George Mackenzie of Tarbat, a noted courtier and favourite of James II. of England, and VII. of Scotland, who, at the beginning of his reign, raiſed him to the dignity of a Viſcount. Lord Tarbat held the office of regiſter, and, as ſuch, was clerk of the Parliaments, and kept and framed the acts and minutes. This entry is made on the firſt day of meeting; and the terms of it are taken notice of in no writer at the time, nor is there any reaſon to ſuppoſe that it was attended to. A new election for Roſsſhire took place, and therefore it muſt have been known that Lord Tarbat's ſon had vacated his ſeat; but, on what account he vacated, might be known to nobody, nor had any one occaſion to inquire. It is undeniable, that the members of the Scots Parliament were in uſe to ſurrender their ſeats upon the moſt frivolous pretences. In the county, for which he ſat, a plauſible reaſon would occur: The whole eſtate of the family, a part of which made the qualification of the Viſcount's eldeſt ſon, was on the eve of being disjoined from that county, as it actually was within ſix weeks after.

All the hiſtorians and writers agree, (and it is particularly ſtated by Sir George Mackenzie of Roſehaugh, in his obſervations on the acts of Parliament), that it was the object of James VI. and his ſucceſſors to diminiſh the influence of the nobility, and to throw weight into the ſcale of the commons in Parliament. To introduce a precedent for depriving the eldeſt ſons of the Peers of their right to ſit in Parliament, was agreeable to this ſyſtem; and no period could be more favourable for it than this of 1685, as no miniſter could be more pliant than Lord Tarbat. The character of this Parliament, in which he was one of the chief rulers, is given by a ſingle ſtroke of Mr Hume's pen: 'No courtier, even the moſt proſtitute, could 'go farther than they towards a reſignation of their liberties.' And one of the articles of grievances voted at the Revolution was in theſe words, 'That moſt of the laws enacted in the Parliament *anno* '1685 are impious and intolerable grievances.'

Hume's Hiſtory, 8vo. Vol. viii. p. 237.

The next, and only other reſolution of the Scots Parliament reſpecting this ſubject, is entered in the journals of the meeting of the Eſtates or Convention Parliament 1689, in the following words: 'Edinburgh, 18th March 1689. The meeting of the Eſtates having 'heard the report of the committee for elections, bearing, that in 'the controverted election for the borough of Linlithgow, in favour 'of the Lord Livingſton and William Higgins, it is the opinion of 'the committee, that William Higgins's commiſſion ought to be 'preferred; *firſt*, in regard of Lord Livingſton's incapacity to re-'preſent a borough, being the eldeſt ſon of a Peer; *ſecondly*, in re-'ſpect William Higgins was more legally and formally elected by 'the plurality of votes of the burgeſſes, they have approven, and 'approves the ſaid report, in both the heads thereof, and interpones 'their authority thereto.'

Upon this caſe, it is to be obſerved, that the petition of Mr Higgins is extant; and, though it is drawn with anxiety, and evidently the work of no mean counſel, entering at large into the proceedings

and

and the legality of the votes given for Lord Livingſton, yet the objection of incapacity is not taken; a proof that it did not occur to the counſel, or was not conſidered as tenable ground, and that the prior reſolution, in the caſe of Lord Tarbat's ſon, was not known, or not held to be a legal precedent. The incapacity appears to have been a diſcovery of the committee; and we know from the hiſtorians and annaliſts of that period, that party then run high, and ſhowed itſelf particularly in the deciſion of controverted elections. The revolutioniſts, or Whigs, had the majority, and were reſolved to preſerve it, by ſtarting every objection to thoſe of the other ſide. Lord Livingſton was a Tory, and actually in arms for King James. Higgins was of an oppoſite complexion, and ſoon after a Preſbyterian clergyman. It does not appear that any defence was ſet up for Lord Livingſton; and it is certain he was not preſent; for the next day there was a proclamation iſſued, ſtating that he was at the head of a body of men near Linlithgow, and requiring him to ſurrender. It may be added, that the reſolution did not paſs in a regular Parliament, but in the Convention of the Eſtates aſſembled at the Revolution, a time ill adapted for an examination into *leſſer* matters of right.

Lord Balcarras's Memoirs; Sir John Dalrymple's ditto.

We paſs next to the period of the Union.

By the 22d article of that treaty, it was agreed, that the number of repreſentatives for Scotland, in the Houſe of Commons of the Parliament of Great Britain, ſhould be forty-five; and that theſe were to be elected in ſuch manner as ſhould be ſettled by an act of the Parliament of Scotland, which act was declared to be as valid as if it were a part of, and engroſſed in the treaty. A bill was accordingly brought into the Parliament of Scotland, and at laſt paſſed into a law, for ſettling the manner of electing the ſixteen Peers and forty-five commoners to repreſent Scotland in the Parliament of Great Britain. While the bill was under conſideration, a motion was made, to inſert a clauſe or declaration in theſe words: 'That 'no *Peer*, nor the eldeſt ſon of any Peer, can be choſen to repreſent

Act 8th, 4th Seſſion Q. Anne's Parliament.

'either ſhire or burgh, in that part of the united kingdom, in the 'Houſe of Commons.' This aroſe from a prevailing notion, that the Peers not elected to repreſent the nobility in the Houſe of Lords of Great Britain, meant to claim the privilege of being elected into the Houſe of Commons. The motion occaſioned a great debate; and it was moved, in place of theſe words, to inſert the following: 'Declaring always, that none ſhall elect or be elected to repreſent a 'ſhire or burgh in the Parliament of Great Britain, from this part 'of the united kingdom, except ſuch as are now capable by the laws 'of this kingdom to elect or be elected as commiſſioners for ſhires 'or burghs to the ſaid Parliament.' It was put to the vote, Whether the *firſt* or the *ſecond* clauſe ſhould be adopted? and the majority decided for the ſecond. In the Scots Parliament, this was the conſtant mode of determining between two oppoſite or different propoſitions; and, in this caſe, it was agreed that the votes ſhould be marked, and a liſt of the members, ſhowing how they ſeverally voted, recorded and printed. It appears by the liſt, that there voted

For the *ſecond* clauſe,—Officers of ſtate *	-	6	
Peers - - -		55	
Repreſentatives of counties		5	
Repreſentatives of burghs		20	
Total	——		86
For the *firſt* clauſe,—Officers of ſtate	-	1	
Peers - - -		1	
Repreſentatives of counties		47	
Repreſentatives of burghs		23	
Total	——		72
Majority			14

* A certain number of the King's miniſters were members of the Scots Parliament by virtue of their offices.

From

From hence it is plain, 1ſt, That the Peers conſidered the *ſecond* clauſe, which was adopted, as not excluding their eldeſt ſons; and, ſatisfied with carrying that point, they appear to have abandoned the original deſign of leaving it open, even to themſelves, to be elected; and 2dly, That the great body of the Commons conſidered it as at leaſt not ſufficient to exclude Peers ſons; and therefore they preſſed for the firſt clauſe, which would have done it effectually. The fair inference from the whole is, That the eldeſt ſons of Peers were not, in the opinion of either party, incapable by the law as it then ſtood; for, if that had been ſuppoſed, the peers gained nothing by the alteration propoſed, and their opponents had not the leaſt occaſion to ſtruggle againſt its adoption, their purpoſe being equally anſwered by either of the clauſes. So far from its being reckoned a clear point, that the Peers ſons were, by the law and cuſtom of Scotland, incapable of repreſenting the Commons in Parliament, it is noticed by the Reporters of the Debates in the Union Parliament, that the prevailing argument againſt the clauſe firſt propoſed was, 'That it had 'been always allowed in Scotland before, that the eldeſt ſons of 'peers might be elected;' and that this was not contradicted by the members of the oppoſite ſide.

Defoe's Hiſtory of the Union, 2d edition, p. 496.

It being thus ſettled by the treaty, that the right of electing, and being elected, into the Houſe of Commons of Great Britain for Scotland, ſhould be governed by the rules which had obtained in that kingdom before the Union, there were choſen in the parliament of Great Britain, ſummoned in 1708, four eldeſt ſons of Scots Peers; namely, Lord Johnſtone, eldeſt ſon of the Marquis of Annandale, for Dumfriesſhire, and alſo for Linlithgowſhire; Lord Haddo, eldeſt ſon of the Earl of Aberdeen, for Aberdeenſhire; Lord Strathnaver, eldeſt ſon of the Earl of Sutherland, for the borough of Tain, &c.; and Mr Sinclair, eldeſt ſon of Lord Sinclair, for the boroughs of Dyſart, &c. Petitions were preſented to the Houſe of Commons, complaining of all theſe elections. Thoſe againſt Lord Johnſtone, Lord Strath-

Strathnaver, and Mr Sinclair, ſtated various objections, beſides alledging generally, that the ſitting members were incapable of being elected as the eldeſt ſons of peers. The petition againſt Lord Haddo was confined to the ſingle point of the incapacity, and went at large into what were no doubt reckoned *the merits* of the caſe. It is worth while to ſtate the argument in the words of the petition. After mentioning the terms of the Treaty of Union, and the relative acts of the Scots Parliament, it proceeds, 'That the eldeſt ſon of any 'peer of the realm could not ſit as a commiſſioner to repreſent any 'ſhire or borough in the Parliament of Scotland, as is evident from 'the following remarkable inſtances now extant upon the Records 'of Parliament, viz. (Here the Reſolutions of 1685 and 1689 are 'quoted), That, nevertheleſs, the power and influence of the Scot-'tiſh nobility is ſo great, that, in many places, their eldeſt ſons have 'at this time been choſen to repreſent both ſhires and burghs in the 'Houſe of Commons of Great Britain, and particularly in the ſhire 'of Aberdeen; which the petitioners conceive is *(at this juncture)* 'a precedent of that conſequence, that, if not prevented, the electors 'and freeholders, in future time, will never be able to withſtand ſo 'powerful an intereſt, but rather, by continual diſcouragements, the 'majority of them muſt become ſubſervient to the nobility in di-'ſtreſſing all thoſe who ſhall have the courage to reſiſt their in-'croaching upon, or giving up, the rights and privileges of the 'Commons: And praying that the Houſe will take the matter into 'conſideration, not only as it relates to a preſent encroachment made 'on the petitioners particular rights and privileges, but (what is of 'far greater moment) as, in all probability, it will in a very ſhort 'time, ſenſibly affect the very being and conſtitution of a Britiſh 'Houſe of Commons, by bringing our ſmall repreſentation into the 'hands of a numerous and powerful peerage, the conſequence 'whereof they have but too great cauſe to fear, and ſubmit them-'ſelves,

Commons Journals Nov. 7. 1708.

'ſelves, liberties, and privileges, into the ſecure protection and wiſe 'proviſion, of a Britiſh Parliament.'

Upon theſe petitions being preſented, the Houſe of Commons appointed a day for taking into conſideration that part of the act for uniting the two kingdoms which relates to the election of members to ſerve for that part of Great Britain called Scotland. And it appears by the Journals, that, upon the 3d of December 1708, counſel were heard, and the petitions and repreſentations relating to that matter were again read; and a motion being made, and the queſtion put, 'That the eldeſt ſons of the Peers of Scotland were capable, by 'the laws of Scotland at the time of the Union, to elect or be elect-'ed as commiſſioners for ſhires or boroughs to the Parliament of 'Scotland; and therefore, by the Treaty of Union, are capable to 'elect or be elected to repreſent any ſhire or borough in Scotland to 'ſit in the Houſe of Commons of Great Britain,'—it paſſed in the negative. On the 6th of December, new writs were ordered for Linlithgow and Aberdeenſhire, in the room of Lord Johnſtone and Lord Haddo, 'declared to be incapable to ſit in the Houſe, being 'the eldeſt ſons of Peers of that part of Great Britain called Scot-'land.' The ſeats of Lord Strathnaver and Mr Sinclair were afterwards vacated in the ſame manner.

No ſatisfactory account remains of what was urged upon this occaſion in the Houſe of Commons. If Chandler's Debates can be truſted to, the petitioners offered no proof of their aſſertion, that peers eldeſt ſons were incapable by the law of Scotland, except the Reſolutions of 1685 and 1689; and the advocates on that ſide of the queſtion entered into general declamation concerning the danger to the liberties of the commons of Scotland, if the peers ſons were declared capable, and the expediency of diminiſhing the influence of the peers themſelves, by an excluſion of their heirs apparent. Chandler ſays, '*little was offered on the other ſide.*' It is even uncertain whether the ſitting members appeared by counſel. A hiſto-

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Scot's Hiſtory of Scotland, p. 746.

rian has mentioned, with the appearance of probability, 'That the 'Peers of Scotland reſted in confidence that the members would not 'ſuffer their eldeſt ſons to be ſo degraded, ſince the eldeſt ſons of 'the Engliſh Peers enjoyed the privilege.'

The reſpect which is due to all determinations of the Houſe of Commons, does not permit one to ſay, That the declamatory arguments which the petitions ſhow were principally relied on by thoſe who attacked the right of the ſitting members could have any influence, though it is well known that, in election matters, the Houſe *was* leſs chaſte than in others. A writer, who would have been the laſt to affix a ſtigma to their proceedings, if a regard to truth and the conſtitution had not extorted it from him, ſays, 'Under the *for-* '*mer* judicature for deciding controverted elections, every principle 'of decency and juſtice were notoriouſly and openly proſtituted.'

Mr Hatſell's Precedents, Vol. ii. p. 13.

In the preſent caſe, it appears, from the way in which the motion was worded, that the Houſe took up the matter properly, conſidering themſelves as deciding a queſtion *of fact*; namely, What the law of Scotland on the point was before the Union; not what it ought to have been, or what was the moſt expedient rule for the time to come. It ſeems to be highly probable that the facts and the law in favour of the rights of Scots Peers eldeſt ſons were not fully explained to the Engliſh Houſe of Commons, who could hardly be maſters of the ſubject, and who, at that critical moment, might be ſuppoſed ready to yield to any thing repreſented to be the general ſenſe and inclination of the Commons in Scotland. If ſuch proofs had been then brought, and ſuch arguments uſed, as the caſe, when now examined, admits of, it will hardly be thought too preſumptuous to ſay the determination would probably have been different. But, ſuppoſing the Houſe of Commons, in 1708, had before them all the lights which the ſubject required, it is not yet too late to aſk and expect a reconſideration of it. If the eldeſt ſons of the Peers of Scotland can ſhow that they were and are eligible by the law of the

the land, their right cannot be cut off, either by thoſe reſolutions of the Scots Parliament, in 1685 and 1689, or by that of the Britiſh Houſe of Commons in 1708; for no man will pretend that the Reſolutions have in themſelves the force of law, much leſs that they can repeal poſitive law. The Reſolutions are, at the beſt, only in execution of what thoſe who made them underſtood to be the law; but, if they erred, the error may and muſt be corrected when diſcovered and demonſtrated. Upon ſuch principles, ſanctioned by the opinion of the Judges, the Houſe of Lords, in 1782, with a liberality which does them infinite honour, reverſed a Reſolution come to in 1711, whereby the Peers of Scotland had been declared incapable of ſitting in that Houſe, by virtue of patents of Britiſh Peerage conferred on them after the Union.

The only hiſtorical facts which remain to be ſtated are, that, in two inſtances, viz. that of Lord Charles Douglas, in 1754, and Mr Charteris in 1787, the ſeats of Scots members were declared to be vacated, in purſuance of the rule laid down in 1708, no regular oppoſition being made. And two other caſes have occurred, which deſerve to be noticed: 1ſt, The eldeſt ſon of the Duke of Atholl having been attainted, the honours of that family were, by act of Parliament, veſted in Lord James Murray, the Duke's ſecond ſon, to deſcend to him at the Duke's death, as if his elder brother had been naturally dead. Lord James Murray was then in Parliament, as member for the county of Perth; and he continued to ſit till the year 1724, when he ſucceeded to the title of Atholl, under the act of parliament. Though thus made the heir-apparent of a Scots title, and in law, though not in fact, the eldeſt ſon of a Scots Peer, the Reſolution of 1708, and the ſuppoſed Rule of the law of Scotland recogniſed by that Reſolution, were held not to reach his caſe. 2d, Lord Strathnaver, eldeſt ſon of the Earl of Sunderland, died, leaving a ſon, called likewiſe Lord Strathnaver, as heir-apparent of his grandfather. This Lord Strathnaver, under that title, was elected

1 Geo. I. Journals.

Commons Journals.

member of Parliament for the county of Sutherland, and ſat unchallenged from 1727 to 1734, when he ſucceeded his grandfather in the earldom. Theſe inſtances prove that the Houſe of Commons hold the Reſolution of 1708 to have been made becauſe they were bound by the letter of the law of Scotland; but that they were not bound to go beyond the letter. The law of Scotland was ſuppoſed to exclude *the eldeſt ſon*, but had not expreſsly excluded *the grand-ſon*, though immediate apparent heir in the dignity, or one whom an act of Parliament ſubſtituted in the place of the eldeſt ſon and heir-apparent; though the reaſon of the thing, and ſpirit and principle of the law, (if any reaſon or principle can be pointed out), muſt go to the one caſe as much as the other. If the objection of ineligibility or incapacity had been taken to Lord James Murray, or to the younger Lord Strathnaver, it was foreſeen that their anſwer would be, 'As commoners we are eligible, and capable by the ge-'neral law: Show us the exception which applies in terms to our 'particular ſituation.' The plea was irreſiſtible in the Britiſh Houſe of Commons; and yet, will any man believe that the diſtinction would have been liſtened to by thoſe who framed the Reſolutions of 1685 and 1689? So the eldeſt ſons of Peers ought to have argued in 1708, and may now argue, 'As commoners we are eligible 'and capable, under the clear, expreſs, comprehenſive words of the 'acts of 1587, 1661, and 1681, if we have in our perſons the qua-'lification in land required by thoſe ſtatutes. Show us the law which 'excludes us, or the proviſo which excepts us. The only difference 'between our caſe and that of Lord James Murray and Lord Strath-'naver is, that the words of the Reſolutions of 1685 and 1689 were 'pointed againſt the eldeſt ſons of Peers; but the doctrine of 'theſe reſolutions, unſupported by any ſtatute, or by any writer, and 'refuted by the facts and ſtatutes we appeal to, cannot be held for 'law, or as evidence of the law.'

IV.

Arguments and authorities againſt the right of the Peers eldeſt ſons conſidered.

IV. What has been ſaid or argued on the other ſide of the queſtion is next to be conſidered. There is not, as already obſerved, a ſyllable in the Statute Book, or a ſingle dictum in any writer upon the law of Scotland, or conſtitution of Parliament, before the Union, which gives countenance to the idea of the eldeſt ſons of Peers being excluded. When Lord Stair and others lay down the general rule, That *all* the King's freeholders are *obliged* (a term for which modern ideas ſubſtitute *entitled*) to attend, and that the *obligation* in the caſe of the leſſer barons was permitted to be fulfilled by the attendance of repreſentatives; it ſeems ſtrange that no notice whatever ſhould be taken of an exception ſo remarkable and (according to the writers ſince the Union) ſo notorious. Either Lord Stair had never heard of the Reſolutions in 1685 and 1689, or, which is more probable, he thought them unworthy of the notice of a ſyſtematical writer.

Soon after the Union, two ſuperficial treatiſes upon the law of Elections for Scotland were publiſhed, one by Mr Forbes, and the other by Mr Spottiſwoode. The firſt ſtates, in ſo many words, that the eldeſt ſons of Peers are ineligible; but the Reſolutions of 1685, 1689, and 1708, are his only authorities. What Mr Spottiſwoode ſays will appear from what ſhall be immediately quoted from a ſubſequent author. Mr Wight, a gentleman at the Scots bar, who, within theſe few years, has publiſhed a voluminous work on the Conſtitution of the Parliament of Scotland, and the preſent laws of election. His great experience in election queſtions, and indefatigable induſtry, entitle one to conclude that his Treatiſe contains the ſubſtance of all the arguments which have been, or which the beſt lawyers imagined could be, urged againſt the right of the Peers eldeſt ſons.

Wight's Inquiry into the Riſe and Progreſs of Parliament.

'The eldeſt ſons of Peers, (ſays Mr Wight), although infeft in 'lands holden of the Crown, of the extent and valuation preſcribed 'by law, are incapable of electing, or being elected, and therefore

Edition in 4to. B. 3. C. 3. pp. 269, 270, 271.

'cannot be admitted to the roll. For this Spottiſwoode aſſigns the 'following reaſons: *That they are* QUASI *Peers of the realm, and 'have a precedency allotted to them; that, by their birth, they en- 'joyed a privilege to ſit in the Parliament of Scotland, and to hear 'the tranſactions in the meetings of the eſtates of the kingdom, in or- 'der to fit them for being worthy members of that auguſt aſſembly, 'when, upon their father's death, they ſhould ſit in their bench; 'and that, in ancient times, they were allowed to ſit and vote in Par- 'liament as proxies for Peers.* But although, for a long time before 'the Union, the eldeſt ſons of Peers were not allowed to ſit in the 'Parliament of Scotland as repreſentatives either of ſhires or of bo- 'roughs, the records afford the moſt complete evidence, that, in 'more ancient times, and before the repreſentation of counties came 'to be thoroughly eſtabliſhed, they ſat in the ſame Parliaments in 'which their fathers attended as Peers. Inſtances of this are to be 'found in the Parliaments 1478, 1481, and 1484; and in the liſt 'of the Parliament 1560, given in Keith's Hiſtory, page 146, we 'find William maſter of Mariſhall, John maſter of Maxwell of Ter- 'riglis, Patrick maſter of Lindeſay, Henry maſter of Sinclair, and 'William maſter of Glencairn. *Perhaps* they ſat, on theſe occa- 'ſions, in virtue of their *happening to be* poſſeſſed of landed pro- 'perty; and, although we meet with no *explicit* enactment of the 'legiſlature aboliſhing this practice, no inſtances of its being conti- 'nued after the laſt mentioned period are to be found in the records. 'It is alſo certain, that, for a *conſiderable time* before the Union, the 'eldeſt ſons of Peers were *underſtood to be* incapable of repreſenting 'either counties or boroughs; and, as the act 1707, cap. 8. decla- 'red that none ſhould be capable to elect, or to be elected, as repre- 'ſentatives of ſhires or boroughs in Scotland, but thoſe who were 'entitled to that privilege by the laws and conſtitution of Scotland, 'they were *thereby effectually debarred* from having any voice in the 'election of the 45 commoners to be returned from that part of the

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'United Kingdom to the Britiſh Parliament; and a declaration to 'that effect was accordingly made by a Reſolution of the Houſe of 'Commons in the Parliament of Great Britain held in 1708.'

It is worthy of obſervation, that Mr Wight, after laying down the propoſition, That the eldeſt ſons of Peers are incapable, refers to Mr Spottiſwoode for the reaſons, without giving any opinion as to the ſolidity of thoſe reaſons, and plainly not wiſhing to have it ſuppoſed that they met with his entire approbation. What Mr Spottiſwoode has ſaid, and Mr Wight has added, as from himſelf, in the paſſage juſt quoted, ſhall be conſidered in the order in which the ſeveral particulars are there ſtated.

1ſt, *The eldeſt ſons of Peers are quaſi Peers of the realm.* It is not eaſy to annex an idea to the phraſe *quaſi Peers*, which is certainly no technical term, and, it is believed, occurs no where but in Mr Spottiſwoode. According to him, they were Peers, and no Peers. Peers without one eſſential privilege of the Peerage; in every reſpect, and in law, upon a level with the commons, except having titles by courteſy, and walking firſt in a proceſſion. It is quite ludicrous to aſſign this as a reaſon for their being excluded from having voices in Parliament.

2d, *They have a precedency allotted to them.* It would be unneceſſary to ſay a word on this, even if the eldeſt ſons of Peers were the only commoners who had precedency allotted to them. But what does Mr Spottiſwoode ſay to the caſe of the younger ſons of Peers, and many others, who have precedency? What would the man, who could aſſign ſuch a reaſon for the ſuppoſed excluſion, have ſaid to the caſes of Lord Strathnaver and Lord James Murray?

3d, *By their birth they enjoyed the privilege of ſitting in the Parliament to hear the tranſactions.* If this were true, it could afford no reaſon for denying them an *efficient* ſeat when poſſeſſed of a qualification; but there is no authority for ſaying they had the privilege by their birth. They were admitted to be auditors by the favour

vour of Parliament, juſt as the Houſe of Lords, at this day, permit the eldeſt ſons of Peers and others to ſtand behind the throne. This appears by an act or reſolution of Parliament in 1662, which it would be unneceſſary to quote here, were it not of ſome conſequence in another part of the argument, as it proves that the eldeſt ſons of Peers were not, in the language of Parliament, called *noblemen*, or meant to be deſcribed by, or comprehended in that term when uſed. It declares, that 'None ſhall be admitted to ſtay in Parliament but 'the ordinar members of Parliament, viz. the archbiſhops, biſhops, '*noblemen*, officers of ſtate, commiſſioners from ſhires and burghs, 'and the clerk regiſter, deputy, and ſervants employed by him to 'ſerve in the houſe; and, *beſides theſe, admittance is allowed to the 'eldeſt ſons, and appearand heirs-male of noblemen*, to the Senators of 'the College of Juſtice, to the knight mariſhall, &c. And it is or-'dained, that none preſume to ſit in the benches, *ſave the nobility 'and clergy;* that the officers of ſtate ſit on the ſteps of the throne; 'that the commiſſioners of ſhires and burghs ſit on the forms ap-'pointed for them; *that noblemen's eldeſt ſons and heirs aforeſaid 'ſit on the lower benches of the throne;* that the Lords of Seſſion ſit 'at an table which is to ſtand betwixt the throne and the commiſ-'ſioners of burghs.'

Here the terms *noblemen* and *nobility* are applied to thoſe who are themſelves Peers in the ſtricteſt ſenſe, in expreſs diſtinction from their eldeſt ſons. Let this be compared with the election-law of 1661, referred to above.

4th, *In ancient times they were allowed to ſit and vote in Parliament as proxies for Peers.* Of this privilege, though it has been commonly aſſerted, there is no evidence whatever. On the contrary, there is the ſtrongeſt preſumption that it never exiſted. The acts of Parliament 1425 and 1503 appear to have allowed, in early times, all members of Parliament to attend by proxy; that of 1587, c. 34. to have put a ſtop to it; and that of 1617, to have allowed

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it again to Peers and Prelates. But no conſtruction of any of the acts, or commentary on them, authoriſes the idea that the eldeſt ſons enjoyed a diſtinction in this reſpect. The rolls always mention when any perſon attended by proxy, and ſometimes give the names of the proxies of Peers. In ſeveral inſtances the proxies were private gentlemen, commoners of no rank; *and not one inſtance is found of an eldeſt ſon being proxy for his father.* But, even if it appeared that Peers eldeſt ſons ſometimes ſat as proxies for their fathers, it is evident that they frequently ſat in a more independent capacity; for, in near half the inſtances of their being marked as attending, *their fathers were alſo preſent.*

So much for Mr Spottiſwoode, who, after this diſcuſſion of his *reaſons*, will not probably be quoted on the other ſide as an authority. It is more probable that the eldeſt ſons of the Peers may refer to his book, as proving how little the ſubject was underſtood in 1708, when a Scots advocate, profeſſing to write on the law of elections in 1710, diſcovers ſuch profound ignorance of hiſtory and the records of Parliament.

After quoting Mr Spottiſwoode's reaſons in ſupport of the rule, that Peers eldeſt ſons are incapable, Mr Wight's acquaintance with the records led him, and his candour obliged him, to ſtate facts which prove, that two centuries ago, when all thoſe *weighty* reaſons ſubſiſted in full force, the rule was unknown. He ſays truly, '*That* '*there is the moſt complete evidence, that, in more ancient times, and* '*before the repreſentation of counties, the eldeſt ſons of Peers ſat in* '*the ſame Parliaments in which their fathers attended.*' Conſequently, they could not have been ſitting as their fathers proxies; and by *ſitting*, Mr Wight muſt mean as conſtituent members, and not attending as auditors only. He knew that this alſo was completely proved by the records.

Inſtances being given, Mr Wight proceeds thus: '*Perhaps they* '*ſat on theſe occaſions in virtue of their happening to be poſſeſſed of* '*landed*

'*landed property*.' Mr Wight felt the neceſſary inference from the facts he had ſtated; but it is evident that he conſidered the point as ſettled by the determinations of 1685, 1689, and 1708, and doubted of the propriety of diſturbing thoſe determinations. He knew that the Peers eldeſt ſons muſt have been entitled to ſit when poſſeſſed of property; for nothing is more certain, than that the Parliament of Scotland was an aſſembly of the landholders, tenants of the King; and the legal conſtitutional idea was, not that they repreſented the people, or particular orders of the people, but that they repreſented the land.

The introduction of Peers by patent or inveſtiture, without reference to territory, and the admitting of certain officers of the Crown to ſeats in Parliament, were innovations of the ſyſtem; but with theſe exceptions, and at the time when the records prove that certain of the eldeſt ſons of Peers were members, there is not the ſhadow of reaſon or authority for imagining that any perſon ſat who had not in himſelf a qualification in freehold land, by virtue of which he was a member, and by virtue of that alone. It cannot be too often repeated, that the attendance was a feudal obligation, and not a privilege; an obligation which none but thoſe liable to it could be called on to fulfil, or could think of diſcharging. It is undeniable, that eldeſt ſons of Peers occaſionally attended. It is equally undeniable, that they attended as conſtituent and efficient members, being elected of committees. Nothing ſhort of abſolute ſcepticiſm can therefore avoid the concluſion, that the Peers ſons ſo entered on the rolls as attending, ſat in their own right, as freeholders, by virtue of their private properties, in the ſame way as if they had been, in the broadeſt ſenſe, commoners, or ſons of commoners.

Mr Wight ſays, this was *before the repreſentation of counties came to be thoroughly eſtabliſhed*, meaning by the act 1587; and he takes notice of the negative fact, of there being no inſtance of a Peer's eldeſt ſon ſitting after that period. He admits, at the ſame time,

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that there is no *explicit* enactment of the Legiſlature aboliſhing the former practice. The word *explicit* is here introduced, as the word *perhaps* is in the firſt part of the ſentence. If it was meant to inſinuate that there was ſome *unexplicit* enactment, or ſome act pointing that way, Mr Wight ſhould have referred to it. It has been already ſhown, that the act 1587, and all the ſubſequent ſtatutes, ſo far from aboliſhing the right, confirm it. If the act 1587 made no other alteration whatever upon the conſtitution of Parliament, but that of excluding the perſonal attendance of the leſſer barons or freeholders, (under the degree of Prelates and Lords of Parliament), requiring *their* attendance, in time to come, by repreſentatives choſen by all thoſe who before had a title, or were obliged to attend in perſon; and, if the eldeſt ſons of Peers were, before that act, obliged to attend when poſſeſſed of freeholds, and actually did attend, but were by the act excluded as freeholders, in common with the general maſs; it is impoſſible to argue, that they were not after the act, and under the preciſe terms of it, entitled to elect and to be elected repreſentatives of the freeholders. If ſuch be the fair and obvious conſtruction of the act 1587, where is the ſubſequent act which either expreſsly or by implication took away the right?

No inſtance can be produced of a Peer's eldeſt ſon ſitting in the Scots Parliament by election after the year 1587. But is it a neceſſary concluſion, that this aroſe from their being conſcious, or from its being underſtood that they had no right? It is otherwiſe and ſufficiently explained by the principle ſo often alluded to; *the obligation to attend had ceaſed.* There was no obligation to be elected a repreſentative. Attendance had hitherto been conſidered as a burden from which the vaſſals were glad to be relieved, of which the act 1587 affords evidence; for, according to it, his Majeſty, in diſpenſing with the attendance of the leſſer barons, was beſtowing a favour; and he granted it upon condition that the freeholders obſerved certain promiſes they had made him, the nature of which are

now unknown. In the ſame light the being repreſentative was conſidered for a long period; the repreſentative was entitled to his charges, and regularly demanded them.

There is not a groſſer, and yet not a more common error, than to eſtimate the manners and ſentiments of a former age by thoſe of our own. To the people of the preſent times, it ſeems a natural and almoſt irreſiſtible concluſion, from there being no inſtance of the eldeſt ſons of the Peers ſitting in Parliament for more than a century, that they had no right, or that if they ever had, it muſt have been taken away; but, when the circumſtances are conſidered, and the views and ſentiments of the different times are compared, the concluſion is altogether fallacious and erroneous. It was no object, during the greater part of the period in queſtion, for any perſon to obtain a ſeat in Parliament. It was then ſhunned as much as it is now coveted; and it was leſs an object to the ſons of Peers than to other gentlemen, becauſe their conſideration in the country could receive little addition by that diſtinction. It was not till towards the end of the 17th century that a ſtruggle for a ſeat was heard of, and not till the very end of it, at the period of the Revolution, that conteſts were carried on with keenneſs. The eldeſt ſons of the Peers of Scotland then put in their claim, but the ſilence of a century was interpreted againſt them; and a rule of excluſion, referring to no law or principle, was adopted to ſerve the purpoſes of party.

Another way of accounting for the eldeſt ſons of the Nobility appearing no longer in Parliament after the alteration introduced by the act 1587, is likewiſe ſuggeſted by the manners of the age. Thoſe who heſitated not to take their ſeats before, in right of their freeholds as barons, and thereby on a level with the Peers, diſdained to come in by election, to ſolicit votes, and to repreſent a body of men whom they conſidered as their inferiors. The high ſpirit or pride of the Scots Nobility of thoſe times was exceſſive; and, in

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that reſpect, their eldeſt ſons, according to Mr Spottiſwoode's phraſe, were no doubt *quaſi* Peers.

But whatever may have been their reaſon for deſiſting, if it was any other than that a legal bar had been created, it cannot operate againſt their ſucceſſors, if they can ſhew inconteſtably that their anceſtors had the right, and were in the exerciſe of it.

Mr Wight goes on to ſay, *It is certain, that, for a conſiderable time before the Union, the eldeſt ſons of Peers were underſtood to be incapable of repreſenting either counties or boroughs.* A *conſiderable* time, is an expreſſion far from preciſe. Mr Wight, however, can mean only a period of little more than 20 years; for, till Lord Tarbat dictated the minute of 1685, there is not the leaſt authority for ſaying or ſuppoſing that the idea had entered the mind of any man whatever. And if, by its being *underſtood*, is meant a *general* underſtanding, the whole of the propoſition may be flatly denied. That there ſhould have been a general underſtanding on a point of law, and a matter of conſtitutional right in its nature moſt remarkable, and yet that no writer of the period ſhould have taken the leaſt notice of it, is utterly incredible. In this period, Lord Stair, Lord Fountainhall, Sir George Mackenzie, and other eminent lawyers, compoſed their works. They treat of the conſtitution of Parliament; and Sir George Mackenzie mentions the fact of Peers eldeſt ſons ſitting in former times as *barons*, without hinting that the right had been aboliſhed. Could ſuch an underſtanding prevail, when Mr Higgins and his counſel, in 1689, laying hold of every colourable objection to the return of Lord Livingſtone, forgot to ſtate the ſhort and deciſive one, that he was ineligible as the eldeſt ſon of a Peer? If, by the general ſenſe of the country, Peers eldeſt ſons were by law incapable of ſitting in Parliament, would the Earl of Drumlanrig have been allowed quietly to take his ſeat, as an officer of ſtate, in 1693? Though the members *ex officio* certainly needed no qualification except their offices, a legal diſability muſt

have operated againſt them as well as others. But, above all, ouldw the debate which has been mentioned have occurred in the Union Parliament, if it had been underſtood to be a ſettled point that the Peers ſons were ineligible? Would the whole body of the Nobility, when ſtruggling for the right of their ſons, have preſſed for the adoption of that enactment, which declared that none but thoſe who were by the law, as it then ſtood, capable of ſitting in the Scots Parliament, ſhould repreſent Scotland in the Houſe of Commons of Great Britain?

Suppoſing, for a moment, that there was ſuch a general underſtanding, if founded in error, can it make, or can it repeal law? Are men to be held incapable of ſitting in Parliament, becauſe people took it into their heads that they were ſo, in the face of ancient cuſtom and poſitive ſtatutes. It is ſaid, that in Scotland an act of Parliament may loſe its force and operation by deſuetude; and therefore, if the capacity which the eldeſt ſons of Peers once enjoyed had depended on any particular ſtatute, there might be plauſibility, though not ſolidity, in ſuch an argument; becauſe it is evident, that the neglect or non-claimer of individuals could not injure the legal right of others not connected with them, and then unborn: But the eldeſt ſons of the Peers ſtand upon the common law of the land, which makes every man eligible unleſs he is diſqualified by poſitive ſtatute. They are claiming as commoners, not as the eldeſt ſons of Peers; and in the former character the right has been all along exerciſed, and under it they muſt be entitled, unleſs they ſtand excluded by ſome law pointed againſt perſons of the latter character in particular.

It is not the right of the eldeſt ſons of the Peers alone which is to be conſidered; that of *the whole body of the electors in Scotland* is involved. Are they to be reſtrained in their choice by a reſolution of one branch of the Legiſlature, if that reſolution is not founded in law, and cannot be argued upon as *public* law? This queſtion

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was ſo fully and ably diſcuſſed on a late memorable occaſion, and, with ſubmiſſion, is ſo clear, that it ſeems unneceſſary to do more than hint its connection with the preſent ſubject.

Mr Wight concludes, 'That as the act of 1707 declared, That 'none ſhould be capable to elect or be elected repreſentatives of 'ſhires or boroughs in Scotland, but thoſe who are entitled to this 'privilege by the laws and conſtitution of Scotland, the eldeſt ſons 'of Peers were thereby effectually debarred from having any voice 'in the election of the forty-five commoners to be returned from 'that part of the united kingdom to the Britiſh Parliament.' Upon this it is enough to obſerve, that it is a mere begging of the queſtion. The eldeſt ſons of the Peers maintain, that they were entitled to the privilege at the time of paſſing the act of 1707, and therefore are not debarred by it from electing or being elected repreſentatives for Scotland in the Houſe of Commons of Great Britain.

Having thus met every part of Mr Wight's argument, it may be right to take notice of a few words on this ſubject which occur in the works of another author, and a moſt reſpectable one, Lord Bankton, who publiſhed his Inſtitutes in 1752. His Lordſhip ſays, 'The eldeſt ſons of Peers cannot repreſent ſhires or boroughs in 'Scotland, *becauſe they muſt have their full repreſentation without 'encroachment from the eſtate of Peers.*' B. 4. Tit. 1. § 41. He quotes no authority for the poſition; and the reaſon he gives ſhows how difficult it is to figure the colour of a reaſon. The deciſion of 1708 had impreſſed on people's minds that ſuch was the law; and from Spottiſwoode downwards, every writer, ſuppoſing there muſt be a reaſon, gives that which firſt occurs to himſelf. Here Lord Bankton ſuppoſes that Peers eldeſt ſons are *of the eſtate of Peers.* What ground there can be for ſaying people are of an eſtate who do not enjoy a ſingle privilege of that eſtate, may be ſubmitted to the common ſenſe of every perſon.

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The acts of Parliament which have been referred to relate only to the elections for counties; and it may be obſerved, perhaps, that nothing has been ſaid on the right of repreſenting the boroughs in Scotland; but it is unneceſſary; becauſe it will be admitted, that, if the eldeſt ſons of the Peers are entitled to be elected for the counties, they muſt be capable to repreſent the boroughs likewiſe. It was common, down to the time of the Union, for thoſe who belonged properly to the eſtate of barons to be elected commiſſioners for boroughs; and an attempt, in the laſt century, to check the practice, proved abortive. In a word, it is now eſtabliſhed that no qualification is neceſſary to be elected for Scots boroughs; and every Britiſh ſubject under the degree of a Peer is eligible, unleſs excluded by ſome poſitive act of the legiſlature on account of perſonal ſituation.

UPON THE WHOLE MATTER,

As it is undeniable that the eldeſt ſons of the Peers ſat in Parliament before the year 1587 as commoners or leſſer barons, in their own right, when poſſeſſed of freeholds:

As the only alteration in the Conſtitution, ſince that period, is, that the leſſer barons ſit by their repreſentatives, inſtead of attending perſonally or individually:

As the intention of the act 1587 was to beſtow the right of electing, or being elected, repreſentatives, upon all the leſſer barons ſo diſcharged from perſonal attendance:

As, by the unequivocal terms of that, and all the ſubſequent election-ſtatutes, the right is veſted in *all freeholders* under the degree of Prelates and Lords of Parliament, poſſeſſed of land to a certain extent; and there is not a word in any of the acts excepting Peers eldeſt ſons being freeholders, either directly, or by any implication:

As the determinations of the Scots Parliament in 1685 and 1689 had no foundation in the law or conſtitution of Scotland, and are accounted for from the circumſtances and ſpirit of the times;

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As the determination of the Britiſh Houſe of Commons in 1708 appears to have been founded ſingly on the Scots precedents; and there is every reaſon to think that the matter was not properly explained upon that occaſion:

And, as the right of electing, or of being elected, if veſted by law, cannot be loſt by diſuſe:

It is to be expected, from the juſtice, liberality, and good ſenſe, of the proper judicature, That, upon reconſideration of the queſtion, and of the evidence here alluded to, or other ſatisfactory evidence to be laid before them, the principle of the Reſolution in 1708, as erroneous, will be REVERSED; and that the eldeſt ſons of the Peers of Scotland will be declared entitled by law to ſit as repreſentatives of the commons of Scotland in Parliament.

APPENDIX, No. I.

Copy of the Roll of Parliament 1481.

XIII Aprilis in dicto Parliamento pntibus Willmo Archiepiſcopo Sancti Andree, Johanne epiſcopo Glaſguen, Jacobo epiſcopo Dunkelden, Roberto epiſcopo Aberdonenſ; Abbatibus de Kelſow, Corſraigwell, Halywood, Priore de Inchmaquholme, ... Domino Cancellario, Comitibus de Anguſiie, Ergile, Athole, Buchane, Monteith, Merſchell, et Rothes; Dominis de Dernlie, *Erſkin*, Oliphant, Glammys, Cathkert, Gray, Carlile, Lyle, Kennedy; prepoſito de Linclowden, Secretario, Clerico regiſtri, prepoſito Sancti Andree; Officiale Laudonie; Magiſtro Alexro Murray, Magiſtro Georgio de Carmychell, Rectore de Flyſk; preceptore de Torfychin; Roberto Crechtown de Sanquhare *Magro de Erſkin*, David Lindiſſay milite, Domino de Dalwolſy, Dno de Bas, Domino Jacobo Liddale milite, *Magro de Halys*, Dno de Corſtorphin, Jacobo Crechton de ....., Johanne de Haldane, Johanne Murray de Tuchadam, Arthuro Forbes, Gilberto Johneſtoune, Dno de Torry, Waltero Stewart, Johane Ross de Montgrenane, Dno Jacobo Crechtoune de Carnys; Magro Ricardo Lawſone; David Rollock Commiſſario de Dundee, Archebaldo Manderſtoun Commiſſario de Berwick, Bertholomeo Carnys, Alexro Turing, et Alexo Bonkill Commiſſariis de Edinburgh, Johane Hadingtoune Commiſſario de Perth, ... Commiſſario de North Berwick.

APPENDIX, No. II.

Copy of the Roll of Parliament 1478.

PARLIAMENTUM excellentiſſimi principis, et dn̄i nr̄i dn̄i Jacobi terti dei gra Scotorum regis illuſtr^mi tent. et inchoat apud Edinburghi primo die menſis Martii anno dni 1478 Sectis vocatis et curia Affirmat Abſen patent ad extra

Comparuerunt

Epi
Glaſguen
Dunkelden
Aberdonen
Moravien
Brechinen
Dumblanon
Ergadien
Orkaden

Abbtes
Prior Stiandri
Abbas de cales
Abbas de Abberbrothok
Abbas ſancte crucis
Abbas de Melroſs
Abbas de Scond
Abbas de Kilwynning
Abbas de Lundoris
Abbas de Newbotle
Abbas de Inchechaff^r
Abbas de columbe

Coītes et barones
Comes de Marr
Comes Atholie
Comes Anguſie
Comes Craufurdie
Comes Buchanie
Comes de Ergile
Comes de Menteth
Comes de Mortoun
Comes de Rothes
Comes de Eroule Conaſtab^us Sco.
Comes Merſchiale Mar^lus Sco.

Abbas

Abbas de Jedworth
Abbas de Corſagwell
Abbas de Culroſs
Abbas de Dundranane
Abbas de Paſleto

Dn̄i Parliati	Burgorum Commiſſarii
Dns Avandale-cancellarius	Berwick
Dns de Erſkyn	Jedwort
Dns Deraly	Selkirk
Dns Haliburtoun	Peblis
Dns Maxwell	Lanark
Dns Sommervile	Dumfres
Dns Lindeſay de Byris	Wigtoun
Dns Kennedy	Kirkudbryt
Dns Kilmawaris	Aire
Dns Flemyng	Irwin
Dns Crechtoun	Dumbretain
Dns Borthwick	Strivelyne
Dns Glammis	Linlithgw
Dns Graye	Edinburgh
Dns Seytoune	Hadingtoun
Dns Oliphant	North berwic
Dns Caithkert	Dunbar
Dns Lyle	Kingorne
Dns de Innermeth	Innerkethin
Dns Carlile	Caraile
Dns Hume	Couper
	Saintandros
	Perth
	Forfare
Barones	Dunde
Preceptor de Torfichen	Brechin
Dns de Yeſter	Monthroſs
Dns de Baſs	Abirdene
Magr de Halis	
Magr de Erſkyn	
Dns de Pettrufy	
Dns de Caldor	
Dns de Ochiltre	
Willmus Edmondſtoun de Duntreth	

Dns

Dns de Auchinlek
Dns de Halkete
Dns de Dalwoulſy
Dns de Haltoun
Dns de Cragy Walace
Dns de Luſe
Dns de Stobhall
Dns de Tulibardin
Dns de Elliotiſtoun
Dns de Halkeriſtoun liddale
Dns de Leſtalrig

N. B. Under the title *Barones* none of the nobility are included. *Dominus* de Yeſter is the *Laird* of Yeſter, or owner of the lands of Yeſter. There was no ſuch title of nobility as Yeſter at this period. There never was ſuch a title of nobility as *Baſs*. And thus the *Maſters* of Hales and Erſkin, eldeſt ſons of the Lords Hales and Erſkin, are here claſſed as *Leſſer* Barons, after the lairds of Yeſter and Baſs.

The original of this Roll, and many others, is in columns, and blank ſpaces left, as here repreſented.